95-1680

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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GENERAL SECRETARIAT OF
THE ORGANIZATION OF AMERICAN STATES,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the funds of an international organization, deposited in a commercial bank and expressly immune from United States governmental "confiscation" by statute and treaty "by whomsoever held," may nonetheless be taken from the organization by virtue of a forfeiture of the depositary bank's assets to the United States Government under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO").

PARTIES TO THE PROCEEDING

The parties to the proceeding are the General Secretariat of the Organization of American States (Petitioner), the United States of America, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International (Luxembourg), S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Co. (Overseas) Limited (Respondents).

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UNITED STATES OF AMERICA, *et al.*
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this forfeiture action on January 19, 1996.

OPINIONS BELOW

The opinion of the court of appeals, reprinted in the appendix hereto ("Pet. App.") at 1a, is reported at 73 F.3d 403 (D.C. Cir. 1996). The opinion of the district court, Pet. App. 1b, is not reported. The district court's order of forfeiture, *United States* v. *BCCI Holdings (Luxembourg), S.A.*, No. CRIM. 91-0655, 1992 WL 100334 (D.D.C. Jan. 24, 1992), Pet. App. 1c, also is not reported.

JURISDICTION

The final judgment of the court of appeals in this case was entered on January 19, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(*l*).

TREATY AND STATUTORY PROVISIONS INVOLVED

Set forth verbatim in the appendix hereto are: Charter of the Organization of American States, April 30, 1948, art. 138, 2 U.S.T. 2394, 119 U.N.T.S. 3, *as amended*, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, Jan. 23, 1993, S. Treaty Doc. No. 22, 103d Cong., 2d Sess. (1994) *and* June 10, 1993, *id.*; Headquarters Agreement Between the Government of the United States of America and the Organization of American States, May 14, 1992, art. I, § 7, art. III, § 1 & art. IV, § 2, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1994); 22 U.S.C. §§ 288 & 288a; and 18 U.S.C. § 1963(*l*).

STATEMENT OF THE CASE

This case involves a challenge to the seizure of the funds of the General Secretariat of the Organization of American States ("OAS") pursuant to an order of forfeiture under the RICO Act's forfeiture provision, 18 U.S.C. § 1963(*l*).

On July 1, 1991, the OAS took steps to place a deposit of $10,000 in the Barbados branch of the Bank of Credit and Commerce International (Overseas) Limited ("BCCI"). Within a few days, on July 5, 1991, bank regulators in the United States (and other countries) seized BCCI and shut down its operations. When the OAS learned that its deposit might be frozen, it attempted to retrieve the deposit through a stop-payment order. As a result of a "claim of late return" filed by Capital Bank, BCCI Barbados's correspondent bank in Miami, Florida, the stop-payment order was reversed. But Capital Bank did not return the OAS's money to BCCI's Barbados branch; instead, it placed the $10,000 in an account at Capital Bank in the name of BCCI Barbados. The official administrator of the Barbados branch took the position that the deposit was not a deposit with BCCI Barbados since the money was not available to the Barbados branch. The BCCI Barbados branch administrator therefore refused to credit the OAS with the $10,000, while at the same time Capital Bank refused to release the OAS deposit back to the OAS.

In January 1992, BCCI pleaded guilty to massive violations of RICO. The District Court for the District of Columbia accepted BCCI's plea. The court entered an order of forfeiture, turning over to the United States Government

all of BCCI's holdings in the United States, including the funds held in the account at Capital Bank in the name of BCCI's Barbados Branch. Pet. App. 1c.

The OAS petitioned the district court to recover its funds pursuant to 18 U.S.C. § 1963(*l*), on the ground that the deposit was immune from governmental seizure by virtue of the immunities established by both international treaty and the International Organizations Immunities Act ("IOIA"), Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified, as amended, in scattered sections of titles 22, 26, and 42 of U.S.C.). The district court dismissed the OAS's petition in an order dated October 28, 1994. Pet. App. 1b.

The Court of Appeals for the District of Columbia Circuit affirmed on January 19, 1996. Pet. App. 1a. Its brief opinion relied virtually entirely on its earlier decision in *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185 (D.C. Cir.), *cert. denied sub nom. Chawla* v. *United States*, __ U.S. __, 115 S. Ct. 2613 (1995) ("*Chawla*"). That decision, involving a claim for relief from forfeiture by private claimants and their representatives, was based entirely on a construction of RICO. No statutory or treaty immunity was at issue.

The court of appeals disposed of the OAS's arguments relying on the IOIA and treaty law by characterizing the OAS's reliance on them as an attempt "to circumvent the rule set out in *BCCI Holdings*." Pet. App. 4a. The court apparently believed that the general and sweeping language of the IOIA and the pertinent treaties (protecting "assets" or "funds . . . belonging to the Organization, by whomsoever held") had to be construed in the same fashion as the narrow

and specialized language of the provisions of RICO that deal with relief from forfeiture. *See* Pet. App. 4a-5a. Presumably, the court believed that RICO implicitly either amended, repudiated, or repealed the immunities provisions of the IOIA and the treaties or that RICO offered a gloss to be applied to the construction of the sweeping terms of these provisions. The court did not appear to be troubled by the fact that it was reading immunities provisions that guarantee freedom from confiscation by the lamp of a statute -- RICO -- whose very intent and purpose was confiscation.

REASONS FOR GRANTING THE WRIT

The present case warrants review. It raises important questions of federal statutory and treaty law as to the relationship between the draconian forfeiture provisions of RICO[1] and the solemn treaty assurances given to international organizations and foreign sovereigns.

The court of appeals held that the funds of international organizations -- and, by logical corollary, those of foreign sovereigns -- lose any and all shields of immunity, however expressed, when they are deposited in a bank and that the United States, despite its treaty commitments and its own immunity legislation, may appropriate those funds by way of a RICO forfeiture action against the depositary bank.

The many activities of international organizations, from the payment of employees to the funding of peacekeeping, involve monies that pass through banks. The

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[1] And other federal forfeiture statutes as well, such as 21 U.S.C. § 853(n)(6). *See* opinion of the district court, Pet. App. 6b, n.2.

decision below puts these funds in jeopardy. It is apt to have precedential consequences adverse to the interests of international organizations, and even to the interests of the United States, in the other nations that are members of these organizations. Thus, it creates a new risk throughout the world for the institutions of international security and cooperation.

I

The Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, *as amended*, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, Jan. 23, 1993, S. Treaty Doc. No. 22, 103d Cong., 2d Sess. (1994) *and* June 10, 1993, *id.*, is a multilateral treaty. It was signed in 1948 and ratified by the United States in 1950. Today, 35 Hemispheric nations are parties to the Charter.

In article 138 of the Charter, the member states guarantee that the OAS will "enjoy in the territory of each Member such legal capacity, privileges, and *immunities* as are *necessary for the exercise of its functions* and the accomplishment of its purposes." (Emphasis supplied.)

In addition to subscribing to the Charter, the United States has committed itself to the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1994) ("Headquarters Agreement"). Like the Charter, this treaty was ratified by the Senate. 140 *Cong. Rec.* S14,475 (*daily ed.* Oct. 6, 1994). Article IV, section 2 of the Headquarters

Agreement tracks the identical provisions in article II, section 3 of the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16. The Headquarters Agreement confirms the broad immunity of the OAS's property from all forms of governmental taking or interference:

> Property of the Organization shall be immune from search, requisition, *confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action.*

Headquarters Agreement, art. IV, § 2 (emphasis supplied).

The "Property of the Organization" which is entitled to the benefits of this broad immunity includes:

> without limitation, *funds* and *assets* belonging to the Organization, *by whomsoever held*; funds and assets held or administered by the Organization in furtherance of its functions under the Charter, *by whomsoever* held . . .; and, in general, all income of the Organization.

Id. art. I, § 7 (emphasis supplied).

The immunity from confiscation of the OAS's "funds . . . by whomsoever held" is the bedrock of the Headquarters Agreement's guarantee that:

> Without being restricted by financial controls, regulations, or moratoria of any kind, the Organization *may hold funds*, gold, or currency of any kind and operate accounts in any currency. The Organization

> *shall be free to transfer its funds*, gold, or currency to and from the United States or within the United States and to convert any currency held by it into any other currency.

Id. art. III, § 1 (emphasis supplied).

The sweeping treaty protection of the property of the OAS from governmental appropriation is reinforced in this country by domestic legislation. The OAS is certified by the President as eligible for the protections of the IOIA. *See* Exec. Order No. 10,533, 19 Fed. Reg. 3289 (1954). The IOIA, like the Headquarters Agreement, bars "confiscation":

> Property and assets of international organizations, wherever located and by whomsoever held, shall be *immune* from search, unless such immunity be expressly waived, and *from confiscation*.

22 U.S.C. § 288a(c) (emphasis supplied).

II

The immunities provisions of the IOIA and the OAS treaties serve important public interests and policy purposes.

Since the end of World War II in 1945, the world community has increasingly turned to multilateral institutions to conduct functions that are beyond the reach of nations acting on their own. The activities that national sovereigns have remitted to these organizations touch the most vital of world interests: global financial stability, the reconstruction of nations shattered by war, the economic and social

development of the world's poorer states, the protection of human rights, the promotion of democracy, and, perhaps most importantly, as exemplified by Petitioner OAS here and by the United Nations, the maintenance of peace and security. The nations in the postwar era also have created a myriad of international organizations dedicated to discrete sectors of international endeavor, from the provision of telecommunications satellite services to regional development banking to the eradication of disease.

All in all, 70 different international organizations are currently certified by the President under the IOIA.[2] Their activities are not financially trivial. The total annual budget of the United Nations, for example, is over $2 billion. The World Bank disbursed over $17 billion of loans in fiscal 1995. The OAS budgeted over $100 million for calendar 1996. These funds routinely pass through domestic banking institutions and through accounts in domestic banking institutions of foreign banks. Indeed, the use of the international banking network is critical to the efficient functioning of these organizations throughout the world.

In addition to the IOIA and its broad immunity protections, many of the constitutive treaties and agreements of these organizations contain explicit immunities provisions identical or analogous to those of the OAS Charter and

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A list of the international organizations certified by the President as entitled to IOIA immunity is set forth at 22 U.S.C.A. § 288 (WL Apr. 1996) (Historical and Statutory Notes).

Headquarters Agreement.[3] The decision below affects them all.

These treaty immunities and their statutory implementation in domestic law are, in essence, an exchange of mutual promises of restraint among member nations. They are essential to the functioning of international

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See, e.g.,

- Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, art. IX, § 4, 60 Stat. 1401, 2 U.N.T.S. 39, *as amended*, Apr. 30, 1976, 29 U.S.T. 2203;

- Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, art. VII, § 4, 60 Stat. 1440, 2 U.N.T.S. 134;

- *U.N. Charter* art. 105;

- Headquarters Agreement Between the Government of the United States of America and the International Telecommunications Satellite Organization, Nov. 22 & 24, 1976, art. 1, 28 U.S.T. 2248;

- Agreement Establishing the Inter-American Development Bank, Apr. 8, 1959, art. XI, § 4, 10 U.S.T. 3068, 3095, 389 U.N.T.S. 69; and

- Constitution of the World Health Organization, *opened for signature* July 22, 1946, arts. 66-68, 62 Stat. 2679, 14 U.N.T.S. 185.

organizations -- "an indispensable guarantee," as C. Wilfred Jenks put it in his *International Immunities* 166 (1961):

> to each member State that the organisation will not become . . . an instrument of policy of other States . . . but will serve legally the common interest as determined by the recognized constitutional processes of the organization. . . . Properly conceived, defined, interpreted and applied, international immunities therefore have an institutional significance of the first order of importance in the present stage of development of international organization.

The United States has agreed to participate in, finance and respect the immunities of each of the organizations of which it is a member specifically because every other member has agreed to the same self-restraint. The immunity guarantees express the mutual recognition of the member states that the particular organization, if it is to achieve the objectives the members seek, must be protected in the exercise of its functions from interference by every member state. The fulfillment by each member of the promise, mutually binding and reciprocally given, to recognize the functional immunities of these organizations is vital if the organization is to act meaningfully.[4]

See Mendaro v. *World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) ("The strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions."); *see also Broadbent* v. *Organization of American States*, 628 F.2d 27, 34

By giving the treaty immunity provisions and the IOIA an interpretation that ignores their text, the decision below undermines the immunities of at least 70 international organizations, and not merely here in the United States. This country is the leading member, by force of its role in world affairs and its financial support, of international organizations. The precedent set by this case will not be ignored elsewhere in countries that may take approaches to forfeitures and confiscations that are even more aggressive than RICO. To render bank accounts of international organizations vulnerable to governmental forfeiture here threatens the integrity of these institutions worldwide.

III

It is not only international organizations that are threatened by the court of appeals' holding. Foreign government bank accounts also are at risk. Like the IOIA, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, with certain exceptions not relevant here, establishes an immunity for "the property in the United States of a foreign state" -- including the property of a foreign central bank. *Id.* §§ 1603, 1609. Yet, according to the court below, bank deposits do not qualify as protected "property" for immunity purposes. This logically means that foreign sovereign and central bank deposits in this country are, like deposits of international organizations, vulnerable to forfeiture.

(D.C. Cir. 1980) ("The United States has accepted without qualification the principles that international organizations must be free to perform their functions and that no member state may take action to hinder the organization.").

IV

The court below sought to avoid the OAS's immunity from confiscation by denying that the forfeiture was of OAS funds. The OAS, the court said, continued to enjoy a depository claim against BCCI -- never mind that BCCI had been shut down, that its cash drawers had been emptied, that the administrator of the BCCI Barbados branch had taken the position that only BCCI's assets in the United States were answerable to the OAS's claim, and that all of BCCI's assets within U.S. jurisdiction had been forfeited to the United States. This was a triumph of form over substance. The court ignored the plain text of the pertinent treaties and the IOIA.

The treaty and statutory bar against "confiscation" plainly means governmental action resulting in a loss of funds to the owner and their transfer to the confiscator. As to "assets" or "funds [of] . . . the Organization by whomsoever held," it is the common practice of the citizenry, and of public international organizations as well, to keep their "funds" in bank accounts as deposits, rather than in mattresses and strongboxes. We trust that the Court may take judicial notice of the fact that this has been the custom in Western nations since well before the post-World War II era when the earliest of the treaties in question was agreed to by the Executive Branch and ratified by the Senate. The Headquarters Agreement, ratified in 1994, uses the same broad "by whomsoever held" language as the 1945 IOIA. The construction that reasonable people would give to a reference to protection against confiscation for "assets" or "funds . . . belonging to the Organization, by whomsoever held" would include bank deposits. Indeed, this

clearly would be the most obvious construction, just as a reference to "wine" would hardly be thought to exclude wine made from grapes.

A governmental forfeiture of a deposit account in which funds belonging to a protected organization have come to rest is obviously a "confiscation" or "expropriation" of "property of the Organization" -- which by definition includes "funds . . . belonging to the organization, by whomsoever held." By treaty, "property" of the OAS includes "assets" and "funds" "of any kind" and "accounts in any currency." The forfeiture here "confiscated" the assets of the OAS, just as surely and effectively as if the United States Government had seized the currency in the petty cash strongbox at the OAS's Pan American Union building headquarters. In this case, what was once an asset of the OAS was transmuted into a credit in the Treasury of the United States. The OAS lost $10,000. The United States gained $10,000. It was the same government action that accomplished both. If this is not confiscation, what is?

The court of appeals did not explain its dismissal of the immunities provisions relied on by the OAS. Perhaps the court thought that the RICO Act abrogated the treaty immunities solemnly agreed to by the United States Executive Branch and ratified by the Senate. In any event, the consequence of the court's holding was to distort the plain meaning of the treaty language and the parallel statutory immunities provisions.

By all the established standards of what is required for a domestic statute to abrogate treaty law, RICO fails to fill the bill. It did not supersede the OAS treaties or the IOIA.

The black letter law is clear. Section 114 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Section 115(1)(a) states the converse:

> An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.[5]

No such "clear purpose" to supersede the immunities provisions covering the OAS exists with respect to RICO. Moreover, the Senate ratification of the Headquarters Agreement postdates the enactment of RICO, so that even if a mechanical "last enactment in time governs" approach

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See Vimar Seguros y Reaseguros v. *M/V Sky Reefer*, 115 S. Ct. 2322, 2326 (1995) ("When two statutes are capable of co-existence, . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (*citing Morton* v. *Mancari*, 417 U.S. 535, 551 (1974))). *See also United States* v. *Welden*, 377 U.S. 95, 103 n.12 (1964) ("Amendments by implication, like repeals by implication, are not favored."); *United States* v. *Palestine Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) ("Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.") *and* cases cited *id.* at 1464-65.

were followed -- which it is not in cases involving the relationship between treaties and domestic legislation -- RICO would not prevail.

V

The OAS does not contend that the entire BCCI forfeiture should be reversed.[6] Its point is that the rights of private depositors are not dispositive of the OAS's rights. The fact that a depositor of a bank may be simply a general creditor is not determinative; the "general creditor" construct describes the relationship of depositors to banks and of their respective rights as depositors *inter se*. There is nothing in the OAS treaties or the IOIA that suggests that a general creditor relationship between the OAS and a bank holding the OAS's funds destroys the protections given by those treaties. The niceties of banking law do not relax the responsibility of governments to respect the assets of international organizations nor change the immunity relationship between an international organization and the host government. The United States may not act in a way that, in purpose and effect, puts money into the government's pocket, and by that same measure strips the international organization of its funds and property, as the United States did in this case.

The OAS is clearly distinguishable in this regard from the plaintiffs in *Chawla*.

CONCLUSION

For these reasons, the case raises significant questions of domestic and international law. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 18, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5411

UNITED STATES OF AMERICA,
Appellee,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A., *et al.*,
Appellees.

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES,
Appellant.

On Appeal from the United States District Court
for the District of Columbia

[Filed Jan. 19, 1996]

Before GINSBURG, HENDERSON and RANDOLPH, *Circuit Judges.*

KAREN LeCRAFT HENDERSON, *Circuit Judge*:

The General Secretariat of the Organization of American States (OAS) appeals the district court's dismissal of its petition under 18 U.S.C. § 1963(*l*) for adjudication of OAS's interest in $10,000 that it deposited with the Bank of Credit and Commerce International (Overseas) Limited (BCCI) and that was subsequently ordered forfeited under 18 U.S.C. § 1963. We affirm the district court's dismissal on the ground that, notwithstanding its status as an international organization, OAS was, like any other bank depositor, a general creditor of BCCI with no legal interest in any specific forfeited property.

The material facts are undisputed. On July 1, 1991, OAS deposited in BCCI's branch bank in Barbados a draft in the amount of $10,000 drawn on an OAS account at American Security Bank (American Security) in Washington, D.C. On July 10, 1991 Capital Bank (Capital) in Miami, Florida, acting as BCCI's correspondent bank, received payment on the draft through the Federal Reserve System (Federal Reserve) from American Security. On July 18, 1991 OAS directed American Security to stop payment on the draft. American Security then credited $10,000 to OAS's account and entered a stop payment order into the Federal Reserve. When Capital received the order, it canceled the draft but filed a "Claim of Late Return" with the Federal Reserve, asserting the stop payment was untimely under Federal Reserve regulations. The Federal Reserve agreed and approved the claim. As a result, American Security debited OAS's account by $10,000 and Capital credited the same amount to BCCI's account with it. OAS subsequently attempted to recover its money from both BCCI and Capital, but without success.

On January 24, 1992 BCCI pleaded guilty to violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962 *et seq.* The same day the district court issued an order of forfeiture against BCCI pursuant to the plea agreement. Among the assets ordered forfeited were the funds in BCCI's account at Capital.

On April 10, 1992, OAS filed a petition for a hearing, under 18 U.S.C. s 1963(*l*), to adjudicate its interest in the $10,000 it had deposited with BCCI. By order dated October 28, 1994, the district court dismissed the petition on the ground that OAS had failed to assert a cognizable interest in any specific forfeited property. OAS appeals that dismissal.

In order to prevail under section 1963(*l*) a petitioner must both assert a legal interest in forfeited property and establish that the interest "vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section." 18 U.S.C. § 1963(*l*)(2), (6). OAS can neither assert nor establish a qualifying interest in the $10,000 it deposited with BCCI because, as we recently held in *United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185 (D.C.Cir.1995), *cert. denied*, __ U.S. __, 115 S.Ct. 2613, 132 L.Ed.2d 856 (1995), "bank depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced, only in the defendant's estate as a whole--and therefore can have no interest in particular assets forfeited, as required under both prongs of § (*l*)(6), unless they have already secured a judgment against the debtor and perfected a lien against a particular item." 46 F.3d at 1191 (citing *United States v. Schwimmer*, 968 F.2d

1570, 1581 (2d Cir.1992); *United States v. Campos*, 859 F.2d 1233, 1240 (6th Cir.1988)).

Attempting to circumvent the rule set out in *BCCI Holdings*, OAS argues that the forfeiture of its deposit infringed the privileges and immunities OAS enjoys as an "international organization." As OAS correctly points out, both its own charter, which is binding on the United States as an OAS member, and the International Organizations Immunities Act, 22 U.S.C. §§ 288 *et seq.*, (IOIA) accord OAS special status to conduct its affairs in the United States. The charter provides that OAS "shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." The IOIA more specifically grants the OAS, and other international organizations, special "status, immunities, exemptions, and privileges," including immunity from legal process and from confiscation of its property, "wherever located and by whomsoever held." 22 U.S.C. § 288a.[1] These privileges

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[1] Section 288a provides in full: International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the

and immunities have no effect, however, on OAS's interest *vel non* in the forfeited property. Under our decision in *BCCI Holdings*, when OAS deposited its money with BCCI, it gave up legal title to the money in exchange for a claim against BCCI for $10,000. Thus, the subsequent forfeiture worked no confiscation of OAS property because OAS retained what it had before—a claim against BCCI for $10,000. Nor was OAS subjected to legal process against its will. The only judicial proceeding in which OAS was a party is the one it initiated itself by filing the section 1963(*l*) petition. In sum, the forfeiture proceeding did not interfere with OAS's legally protected status.[2]

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purpose of any proceedings or by the terms of any contract.
(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.
(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

22 U.S.C. § 288a.

[2] OAS also argues for the first time that it is entitled to recover under section 1963(*l*) because the money it deposited did not come into BCCI's possession until after BCCI's criminal conduct ceased. Because OAS did not advance this argument below, it is waived on appeal. *See Souders v. Washington Metropolitan Transit Auth.*, 48 F.3d 546, 550 (D.C.Cir.1995).

Because the undisputed facts reveal that OAS had no vested or superior interest in the forfeited property, as required to recover under 18 U.S.C. § 1963(*l*), the judgment of the district court is

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 91-0655 (JHG)

UNITED STATES OF AMERICA,
Plaintiff,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A.,
BANK OF CREDIT AND COMMERCE
INTERNATIONAL, S.A.,
BANK OF CREDIT AND COMMERCE
INTERNATIONAL (OVERSEAS) LIMITED,
INTERNATIONAL CREDIT AND INVESTMENT
COMPANY (OVERSEAS) LIMITED,
Defendants.

ORDER DISMISSING THE PETITION OF THE GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES

[Filed Oct. 28, 1994]

Presently pending is the United States' motion to dismiss the petition for a hearing to adjudicate an interest in forfeited property filed by the General Secretariat of the Organization of American States ("OAS"). Upon consideration of the motion to dismiss, all filings relating thereto and oral argument, the motion is granted and the petition is dismissed.

BACKGROUND[1]

On January 24, 1992, this Court, following findings of fact and conclusions of law with supporting reasons made in open court, accepted the pleas of guilty of the four corporate defendants (collectively "BCCI") and the plea agreement between them and the United States of America. Thereupon, and in accordance with 18 U.S.C. § 1963, an Order of Forfeiture was entered. Paragraph 1(e) of the Order provides that the corporate defendants named in this action shall forfeit to the United States ownership interests in all property located in the United States, including, without limitation, real property and all tangible and intangible personal property, however held, whether subsequently identified, determined or discovered in the course of the ongoing liquidation proceedings described therein or otherwise identified, determined, or discovered in any manner at any time, but not property that may be brought into the United States by or on behalf of court-appointed fiduciaries of BCCI in the course of the management or disbursement of the liquidation estates as described in the

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[1] At the expense of repetition, this Order contains some of the Background and Discussion included in earlier orders. This was done primarily to afford full illumination to those parties impacted herein who may not have easy access to earlier orders.

plea agreement. Attached to the January 24, 1992 Order as Exhibit A was a list of specific BCCI accounts, with corresponding numbers, names, and approximate balances, which the United States Marshals Service was directed to seize forthwith. Because the government was unable to verify certain information concerning additional forfeitable accounts at the time the Order of Forfeiture was entered, the Court issued a supplemental Order on January 31, 1992 which directed immediate seizure of the specific assets listed therein.

In satisfaction of 18 U.S.C. § 1963(*l*)(1), and to inform third parties of potential rights to seek recovery of assets declared forfeited, the United States published notice of the Order of Forfeiture, as amended, during the period between February 13, 1992 and March 27, 1992 in eleven major United States newspapers including the *Wall Street Journal*, the *New York Times*, the *Chicago Tribune*, and the *Los Angeles Daily Journal*. *See* Government's Compliance with Order of May 8, 1992, filed May 12, 1992. In addition, personal notice was sent to over 340 persons and entities as late as April 3, 1992. *Id.*

OAS filed its petition for a hearing under 18 U.S.C. § 1963(*l*) and for release of $10,000, and any interest earned thereon. The $10,000 at issue was seized pursuant to the January 24, 1992 order of forfeiture from the Bank of Credit and Commerce International (Overseas) ("BCCI (O)") Barbados account maintained at Capital Bank of Miami, Florida ("Capital Bank"), in account number 902205110.

The disputed money travelled an unusual path to account number 902205110 at Capital Bank. On July 1, 1991, the General Secretariat deposited a draft in the amount of

$10,000 in its demand deposit account with BCCI(O) Barbados. The draft was drawn on OAS's account with American Security Bank, N.A., in Washington, D.C. ("American Security"). BCCI(O) Barbados accepted the draft and presented it for payment through Capital Bank. ON July 10, 1991, American Security paid the draft. Thus, as of approximately July 10, 1991, the $10,000 was in OAS' account at BCCI(O) Barbados.

Around this time, OAS became concerned that its money in BCCI (O) Barbados would be "frozen" because of BCCI(O)'s "problems with Barbados authorities." Petition at 2. On July 18, 1991, therefore, OAS returned the draft to American Security and requested a stop payment. OAS claims that American Security promptly credited OAS' account at American Security in the amount of$10,000.

Capital Bank received and processed the stop payment order on August 8, 1991. Also on August 8, 1991, however, Capital Bank filed a "Claim of Late Return" with the Federal Reserve asserting that the stop payment order was not received within the time frame prescribed by Federal Reserve regulations.

Several days later, the Federal Reserve Bank accepted Capital Bank's claim and reversed the stop payment order. As a result, the Federal Reserve debited American Security's account at the Federal Reserve Bank and credited the account of Capital Bank in the amount of $10,000. American Security then re-debited OAS' account at American Security and Capital Bank re-credited BCCI(O) Barbados' account number 902205110 at Capital Bank.

BCCI(O) Barbados, however, refused to allow OAS to withdraw the money, and Capital Bank refused to return the money to either BCCI(O) Barbados or to OAS. On March 13, 1992, the General Secretariat learned that the money in BCCI(O) Barbados' account number 902205110 had been seized by the United States Marshals pursuant to this Court's January 24, 1992 order of forfeiture.

On April 10, 1992, the General Secretariat filed its petition of a hearing pursuant to § 1963(*l*) and on May 12, 1992 the OAS filed an affidavit in further support of its petition. In accordance with the Court's briefing schedule, the United States filed a motion to dismiss the petition. OAS opposed this motion, the United States filed a reply and the OAS filed a response to the United States' reply. Oral argument was heard on this motion and the matter is ripe for review.

DISCUSSION

Title 18, United States Code, § 1963 sets forth an orderly procedure by which third parties seeking to recover interests in forfeited property may obtain judicial resolution of their claims. The provision granting standing to parties seeking to amend an order of forfeiture to exclude certain property states:

> Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice ..., whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property.

18 U.S.C. § 1963(*l*)(2). Section 1963(*l*)(6) sets forth the substantive elements which a third party must establish to obtain amendment of an order of forfeiture and provides, in full:

> If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—
>
> > (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
> >
> > (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination.[2]

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[2] Title 18 U.S.C. § 1963(*l*)(6) contains exactly the same language as 21 U.S.C. § 853(n)(6), the statute providing for forfeiture in criminal narcotics cases, and it appears that no court has interpreted these two provisions differently. Because the two subsections are identical and because of the relative dearth of case

18 U.S.C. § 1963(*l*)(6).

Only by establishing standing and satisfaction of all requisite elements of either § 1963(*l*)(6)(A) or (B) may a party obtain judicial relief from an order of forfeiture. *See United States v. Schwimmer*, 968 F.2d 1570, 1584 (2d Cir. 1992) ("The *only* role of the District Court is to amend the other of forfeiture where a genuine property interest of the sort specified in § 1963(*l*)(6) is demonstrated.") (emphasis in the original); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) ("Those third parties who fall outside of the [limited avenues of relief], regardless of how sympathetic they are, must petition the Attorney General for relief."). If a third party fails to allege in its petition all elements necessary for recovery, including those relating to standing, the court may dismiss the petition without providing a hearing. *See United States v. Campos*, 859 F.2d 1233, 1240 (6th Cir. 1988); *United States v. Mageean*, 649 F. Supp. 820, 825 (D. Nev. 1986), *aff'd without opinion*, 822 F.2d 62 (9th Cir. 1987); S. Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 3374, 3391.

OAS' petition presents an intriguing issue. It asserts that it is entitled to relief from the order of forfeiture because its money is immune from confiscation pursuant to OAS Charter Article 139, which is binding on the United States as a Member State, and the International Organizations

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law interpreting and applying § 1963(*l*), the Court's opinion relies on reasoning contained in § 853(n) cases as well as in § 1963(*l*) cases.

Immunities Act ("IOIA"), codified at 22 U.S.C. §§ 288-288i.

The OAS was created by a Charter signed and ratified by the United States and other Member States. The OAS Charter is a treaty that has the force and effect of law in the United States. Article 139 of the Charter provides that the OAS "shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." These immunities include immunity from legal process. *See Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) (noting that international organizations are entitled to "immunity from legal process, from financial controls, taxes, and duties") (quoting Restatement of the Foreign Relations Law of the United States (Revised) § 464(*l*) (Tentative Draft No. 4) (1983)); *see also Broadbent v. OAS*, 628 F.2d 27, 35 (D.C. Cir. 1980) (stating that "[i]nternational officials should be as free as possible within the mandate granted by the member states to perform their duties free from the peculiarities of national politics").

Similarly, the IOIA confers immunities on "those international organizations in which the United States participates pursuant to a treaty or congressional act, and which have been designated by the president as being entitled to enjoy the provisions of the Act."[3] *Mendaro*, 717 F.2d at 613. Pursuant to the IOIA:

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[3] The United States does not contest the applicability of the IOIA to the OAS.

> International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.
>
> * * *
>
> Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from ... confiscation.

22 U.S.C. § 288a(b), (c); *see Broadbent*, 628 F.2d at 30-31.

Relying on both Article 139 and the IOIA, the OAS asserts that its $10,000 in account number 902205110 was not subject to forfeiture. This argument, however, fails to address the requirements for standing under § 1963(*l*)(2). As noted above, to have standing, a petitioner must assert "a legal interest in property which has been ordered forfeited to the United States." Only if the OAS can establish that it has a "legal interest" in the $10,000 in account number 902205110 at Capital Bank can it argue that either Article 139 or the IOIA prohibit forfeiture of that interest.[4]

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[4] In fact, the existence of the OAS Charter and the IOIA are virtually irrelevant to this proceeding because § 1963(*l*) itself prohibits forfeiture of property that belongs to anyone other than the defendants.

OAS cannot establish a "legal interest" in the $10,000 in account number 902205110 at Capital Bank. Once OAS deposited the money in its account at BCCI(O) Barbados, it became a general unsecured creditor of BCCI(O) Barbados. *See United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F. Supp. 106, 109 (D.D.C. 1993) ("[w]hen a general deposit is made, title to the deposited funds passes immediately to the bank" and "one who makes a general deposit is considered a general creditor of the bank"); *see also Peoples Westchester Sav. Bank v. F.D.I.C.*, 961 F.2d 327, 332 (2d Cir. 1992) ("an owner of a general deposit is a general creditor of a bank"); *Matter of Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1075 n.11 (5th Cir. 1985) ("[n]ormally, funds deposited with a bank are general deposits which create a debtor-creditor relationship between the bank and its depositor"). The fact that OAS can trace its funds into the account at Capital Bank does not create a special deposit in which the depositor retains title to the money. *See United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F. Supp. at 109 (noting that deposits are presumed to be general and that a bank's failure to maintain segregated funds is "very strong evidence" that a deposit is general); *see also Peoples Westchester Sav. Bank*, 961 F.2d at 330. No provision of the OAS Charter or the IOIA changes this result, and the fact that OAS attempted to cancel the transaction is similarly unavailing.

As a general creditor, OAS does not retain an ownership interest in the deposited money, or in any particular asset of the bank. *United States v. BCCI Holdings (Luxembourg), S.A.*, 814 F. Supp. at 110. Rather, it becomes a general creditor against the entirety of the bank's estate. *See United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992) ("A general creditor has no interest in a particular asset or

particular funds that is either vested or superior to a defendant's. He may have a right to receive payment, but he does not have a property interest superior to defendant's in any particular asset or funds .... "); *United States v. Reckmeyer*, 836 F.2d 200, 206 & n.3 (4th Cir. 1987) ("unlike secured creditors, general creditors cannot point to any one specific asset and claim that they are entitled to payment of the value of that specific asset. General creditors instead enjoy a legal interest in the entire estate of the debtor."); *United States v. Mageean*, 649 F. Supp. 820, 828 (D.D.C. 1986), *aff'd*, 822 F.2d 62 (9th Cir. 1987). In sum, the $10,000 in account number 902205110 is merely an asset of BCCI(O) Barbados, not an asset of OAS.

Because general creditors are unable to assert interests in specific assets, they cannot assert legal rights, titles, or interests "in property which has been ordered forfeited" as required by § 1963(*l*)(2), at least where a defendant's entire estate is not subject to forfeiture. *See Reckmeyer*, 836 F.2d at 206 n.3 ("It is the dilemma of linking their interest to a specific asset rather than the problem of asserting a legal interest in the debtor's estate that frustrates general creditors who attempt to contest ... forfeitures."). Accordingly, given that the Court's Order of Forfeiture reaches only property located in the United States and not the entire estates of the four corporate defendants, OAS does not have standing to seek amendment of the Court's Order of Forfeiture under § 1963(*l*)(2) and its petition must be dismissed.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that the petition filed by the General Secretariat of the Organization of American States is dismissed;[5] and it is

FURTHER ORDERED that, there being no just reason for delay, the clerk shall enter final judgment with regard to the petition dismissed herein.

IT IS SO ORDERED.

October 28, 1994

/s/Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

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[5] Under these unusual circumstances, it would appear particularly appropriate for the claimant to petition the Attorney General for remission or mitigation of forfeiture. *See United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 91-0655 (JHG)

UNITED STATES OF AMERICA
Plaintiff,

v.

BCCI HOLDINGS (LUXEMBOURG), S.A.,
BANK OF CREDIT AND COMMERCE
INTERNATIONAL, S.A.,
BANK OF CREDIT AND COMMERCE
INTERNATIONAL (OVERSEAS) LIMITED,
INTERNATIONAL CREDIT AND INVESTMENT
COMPANY (OVERSEAS) LIMITED,
Defendants.

ORDER OF FORFEITURE

[Filed Jan. 24, 1992]

JOYCE HENS GREEN, *District Judge*.

The United States of America and the four corporate defendants in this case (collectively, "BCCI") have entered into a Plea Agreement dated December 19, 1991, by which the

defendants agree to plead guilty to an offense under Title 18, United States Code, Section 1962, and to forfeiture of the assets of the four corporate defendants located in the United States pursuant to Section 1963 of Title 18.

As recited on the record today in open court, the Court has determined pursuant to Rule 11(e), Federal Rules of Criminal Procedure, that the Plea Agreement is acceptable to the Court. The Court has determined pursuant to Rule 11(f), Federal Rules of Criminal Procedure, that there is a factual basis for the pleas of guilty and for the forfeiture of the defendants' assets as set forth in the Superseding Information, the Plea Agreement, the statements of counsel in open Court, and the testimony of the representative of the defendants.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Pursuant to Title 18, United States Code, Sections 1963(a)(1), (a)(2), and (a)(3), the following property located in the United States of the four corporate defendants is hereby condemned and forfeited to the United States of America:

(a) the deposits and other assets listed on Exhibit A, which Exhibit A is hereby made a part of this Order, except those funds listed on Exhibit A which are held by American Express Bank Ltd., Bank of California, Capital Bank Miami, and Oppenheimer & Co., Inc., because counsel have been unable at this time to reconfirm or update the list of assets held by those institutions. Counsel for the parties to this case shall provide to the Court, by January 29, 1992 at 12:00 noon, an updated list of forfeitable assets held by American Express Bank Ltd., Bank of California, Capital Bank Miami, and

Oppenheimer & Co., Inc., at which time, upon approval by the Court, such assets shall become subject to this Order of Forfeiture.

(b) the net proceeds from the future sale or other disposition or transfer of any stock, security or other interest in Independence Bank, but not the stock, security or other interest itself;

(c) the net proceeds from the future sale or other disposition or transfer of any stock, security or other interest in First American Bankshares, Inc., but not the stock, security or other interest itself;

(d) the balance of the liquidation estates of the Los Angeles and New York agencies of BCCI, S.A., but not the estates themselves, upon completion of liquidation proceedings conducted by the New York banking and the California banking entities in accordance with the laws of California and New York. For purposes of the foregoing, the "liquidation estates" shall consist of all of the rights and interests of the Superintendent of Banks of the states of New York and California under their respective state law banking statutes with respect to the assets of BCCI, S.A. located in their respective states and the assets of the New York and California agencies of BCCI, S.A. The liquidation estates do not include the assets enumerated in Exhibit A; and

(e) the entirety of BCCI's ownership interests in all other property located in the United States, including, without limitations, real property and all tangible and intangible personal property, however held, whether subsequently identified, determined or discovered pursuant to paragraph 10

of the Plea Agreement, in the course of the ongoing liquidation proceedings described therein or otherwise identified, determined, or discovered in any manner at any time, but not property that may be brought into the United States by or on behalf of Court Appointed Fiduciaries of BCCI in the course of the management or disbursement of the liquidation estates as described in the Plea Agreement.

2. The Court finds that the above-listed forfeited assets constitute interests acquired or maintained by the defendants, in violation of Title 18, United States Code, Section 1962; or are interests in, securities of, claims against, or property or contractual rights of various kinds affording a source of influence over an enterprise which the defendants established, operated, controlled, conducted, or participated in, in violation of Title 18, United States Code, Section 1962; or are property constituting or derived from, proceeds the defendants obtained, directly or indirectly, from racketeering activity, in violation of Title 18, United States Code, Section 1962.

3. It is further ORDERED that, except as specifically excepted in paragraph 1(a) and as noted in paragraph 4, each of the financial institutions and entities listed on Exhibit A shall immediately pay to the United States Marshal for the District of Columbia or his duly authorized representative:

1) the entire contents of the accounts listed on Exhibit A, including interest accrued;

2) any funds transferred since July 5, 1991, from any account listed on Exhibit A that are still within the possession or control of the financial institution, regardless

of the account into which those funds were transferred and regardless of the reason for the transfer; and

3) any other funds in any other account held by BCCI (Overseas) or International Credit and Investment Company (Overseas).

Such payments shall not be limited to the "Approximate Amounts" listed on Exhibit A if the balance as of this date is greater than the Approximate Amount. For the purposes of this paragraph, an "account listed on Exhibit A" includes any account that previously held funds listed on Exhibit A, or any account to which such funds have been transferred.

4. With respect to the funds listed on Exhibit A as being held on deposit in the Court Registry Investment System ("CRIS") interest-bearing account administered by the United States District Court for the Southern District of Texas, such funds are hereby ORDERED forfeited to the United States. In lieu of the immediate transfer of those funds pursuant to paragraph 3, the United States shall take all necessary steps pursuant to Title 28, United States Code, Section 2042, to obtain an order directing the transfer of those funds to the United States Marshal for the District of Columbia.

5. It is further ORDERED that to the extent necessary to carry out the terms of this Order, BCCI, pursuant to the Plea Agreement, shall assist the financial institutions and entities listed on Exhibit A in the transfer of such funds.

6. It is further ORDERED that the United States Marshal's Service shall deposit all funds received pursuant to this Order of Forfeiture in the Department of Justice Seized Asset Deposit

Fund Account (hereafter, "the Account") and invest it with interest as permitted by Title 28, United States Code, Section 524(c), as amended October 28, 1991.

7. Pursuant to the ancillary hearing procedures set forth in Title 18, United States Code, Section 1963(*l*), no disbursements shall be made from the Account without further Order of this Court. Should it appear that no claim has been made with respect to particular assets transferred to the Account pursuant to Section 1963(*l*), or at such time as such claims to such assets have been resolved, the Court will entertain motions from the government for the disbursement of those assets.

8. As the proceeds identified in paragraphs 1(b) through (e) become available, the Department of Justice, on behalf of the United States, shall apply to this Court for appropriate Orders effecting the transfer and deposit of such proceeds into the Account. The notice provisions of Section 1963(1) shall apply to each asset so transferred to the Account pursuant to such further Orders.

9. Pursuant to Rule 32(b)(2), Federal Rules of Criminal Procedure, it is further ORDERED that each of the above listed properties, except as specifically excepted in paragraph 1(a) and as noted in paragraph 4, shall be seized forthwith by the United States Marshal for the District of Columbia or his duly authorized representative and disposed of in accordance with the law and this Order of Forfeiture.

The Clerk is hereby directed to send copies of this Order to all counsel of record and the United States Marshal.

IT IS SO ORDERED.
January 24, 1992 /s/Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

EXHIBIT A[*]

[. . .]

Capital Bank Miami Miami, Florida	$946,485	Acct. #0902205110

[. . .]

[* Exhibit A of the Order of Forfeiture has been edited to include only the account relevent to the present Petition for A Writ of Certiorari.]

CHARTER OF THE ORGANIZATION OF AMERICAN STATES

Article 138

The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes.

HEADQUARTERS AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE ORGANIZATION OF AMERICAN STATES

ARTICLE I — DEFINITIONS

Section 7

"Property of the Organization" means all real, personal, and other property, including, without limitation, funds and assets belonging to the Organization, by whomsoever held; funds and assets held or administered by the Organization in furtherance of its functions under the Charter, by whomsoever held, including, without limitation, the Organization's Retirement and Pension Fund; and, in general, all income of the Organization.

ARTICLE III — RIGHT TO HOLD CURRENCY

Section 1

Without being restricted by financial controls, regulations, or moratoria of any kind, the Organization may hold funds, gold, or currency of any kind and operate accounts in any currency. The Organization shall be free to transfer its funds, gold, or currency to and from the United States or within the United States and to convert any currency held by it into any other currency.

ARTICLE IV — GENERAL PRIVILEGES

Section 2

Property of the Organization shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action. No waiver of immunity relative to property of the Organization shall extend to any measure of execution unless that waiver expressly states that it is a waiver of immunity from execution upon such property.

INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT

22 U.S.C. § 288

"International organization" defined; authority of President

For the purposes of this subchapter, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or it officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.

22 U.S.C. § 288a

Privileges, exemptions, and immunities of international organizations

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;
(ii) to acquire and dispose of real and personal property;
(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT

28 U.S.C. § 1963(*l*)

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General ma direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within the

thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchase for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(2)

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No. 95-1680

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE INTER-AMERICAN DEVELOPMENT BANK AND THE PAN AMERICAN HEALTH ORGANIZATION/WORLD HEALTH ORGANIZATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The Inter-American Development Bank ("IADB") and the Pan American Health Organization, Regional Office for the Western Hemisphere of the World Health Organization ("PAHO/WHO") are public international organizations. The IADB is an organization whose members are the governments of 46 countries, including the United States, and whose purpose is to contribute to the acceleration of the economic and social

development of its developing member countries, individually and collectively. PAHO/WHO, which has a membership consisting of 38 nations, including the United States, is a specialized agency of the United Nations dedicated to public health in the Western Hemisphere.

The property of both the IADB and PAHO/WHO, like the property of the General Secretariat of the Organization of American States ("OAS"), is immune from governmental confiscation by law. *Amici* desire to bring to the attention of the Court the adverse consequences for public international organizations other than the OAS of the ruling of the United States Court of Appeals for District of Columbia Circuit in this case.[1]

ARGUMENT

The Court of Appeals, in an action following an order of forfeiture by the United States of the assets of the Bank of Credit and Commerce International (Overseas) Limited ("BCCI") under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, upheld the denial of a claim by the OAS to a deposit it had made in a branch of BCCI. This decision raises a significant question of domestic and international law that merits review by this Court.

Like the OAS, the IADB and PAHO/WHO have been designated by the President as entitled to immunity under the International Organizations Immunities Act ("IOIA"), Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified, as amended, in

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[1] The parties to this proceeding, the OAS, the United States of America, BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International (Luxembourg), S.A., Bank of Credit and Commerce International (Overseas) Limited, and International Credit and Investment Co. (Overseas) Limited, have consented to the submission of this brief. Their written consent is on file with the Court.

various sections of titles 22, 26, and 42 of U.S.C.). See 22 U.S.C.A. § 288 (WL Apr. 1996) (Historical and Statutory Notes). The IOIA explicitly grants each organization so designated, including the IADB, PAHO/WHO and the OAS, immunity from, *inter alia*, the "confiscation" of the organization's "property and assets." Specifically, the IOIA provides:

> Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation.

22 U.S.C. § 288a(c).

In addition, the property of the IADB, like the property of the OAS, is protected from confiscation pursuant to an international agreement by which the signatory member states, including the United States, have bound themselves. Article XI, Section 4 of the Agreement Establishing the Inter-American Development Bank, Apr. 8, 1959, 10 U.S.T. 3068, 3095, 389 U.N.T.S. 69, explicitly provides:

> Property and assets of the Bank, wheresoever located and by whomsoever held, shall be considered public international property and shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

The immunities guarantees of the IOIA and the above-cited treaty are essential to the fulfillment of the functions that the member states have assigned to *amici*. Both *amici* maintain a significant portion of their assets in the form of deposits in commercial banks. The IADB disburses a portion of its multi-billion dollar loan portfolio to its borrowers

through commercial bank accounts. PAHO/WHO purchases over $65 million annually in medical equipment and public health supplies and systems, much of it by commercial bank checking. Absent full protection of these assets as intended by the international treaties by which *amici* were created and as reflected in the IOIA, *amici* cannot function with the independence required of a multi-governmental body. Indeed, the vulnerability of the bank accounts of *amici* and similar organizations to governmental confiscation or taking could adversely affect the functioning of all of the 70 international organizations designated by the President under the IOIA.

The erosion of international organization immunities by the United States may be expected to establish a precedent of persuasive consequence in chanceries and courts throughout the world. The United States is the single largest shareholder of the IADB. The United States provides the greatest contribution to the public health efforts of PAHO/WHO. The leading role of the United States in *amici* and the other international organizations of which it is a member makes the decision below of global significance.

CONCLUSION

This is an important case with international consequences. *Amici curiae* the IADB and PAHO/WHO respectfully request that the Court grant the Petition for Writ of Certiorari of the General Secretariat of the OAS.

Respectfully submitted,

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No. 95-1680

In the Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether treaties and statutes that prohibit the government from confiscating property belonging to the Organization of American States (OAS) prevent the forfeiture of assets that were deposited by the OAS in, and thus belonged to, a bank convicted of violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 73 F.3d 403. The opinion of the district court (Pet. App. 1b-12b) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1996. The petition for a writ of certiorari was filed on April 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 1, 1991, petitioner General Secretariat of the Organization of American States (OAS) deposited in the Barbados branch of Bank of Credit and Commerce International (Overseas) Limited (collectively with certain related entities, BCCI) a $10,000 draft drawn on petitioner's account at American Security Bank in Washington, D.C. On July 10, payment on the draft was received by Capital Bank in Miami, Florida, BCCI's correspondent bank. Pet. App. 2a. In the interim, bank regulators in several countries had jointly seized and shut down BCCI's operations, in the face of mounting evidence of BCCI's insolvency and its extensive involvement in criminal activities. Authorities cooperated thereafter on a worldwide basis to consolidate BCCI's assets and to coordinate a global distribution to BCCI's depositors and other creditors. *United States* v. *BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1187 (D.C. Cir.), cert. denied, 115 S. Ct. 2613 (1995).

Concerned that its account in Barbados would be frozen as a result of BCCI's financial collapse, petitioner directed American Security Bank to stop payment on the $10,000 draft. The stop payment order (received by Capital Bank on August 8, 1991) was reversed as untimely, however, and petitioner was unsuccessful in later attempts to seek repayment directly from BCCI and Capital Bank. Pet. App. 2a.

2. On January 24, 1992, BCCI pleaded guilty in the United States District Court for the District of Columbia to violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Pet. App. 3a. In accordance with the plea agreement, the district court issued an order under

18 U.S.C. 1963 (Pet. App. 1c-7c) forfeiting all of BCCI's assets located in the United States, including the funds held by Capital Bank on BCCI's behalf. The plea agreement provided that half of the forfeited assets would be transferred to a global liquidation fund, and the other half would be used, *inter alia*, to offset losses suffered by the Federal Deposit Insurance Corporation's Bank Insurance Fund, and United States taxpayers generally, as a result of BCCI's unlawful activities. See *BCCI Holdings*, 46 F.3d at 1187.

3. On April 10, 1992, petitioner requested a hearing, under 18 U.S.C. 1963(*l*)(2) and (6)(A), to establish its right to $10,000 of the forfeited assets. Pet. App. 3a, 5b. After briefing and oral argument, the district court dismissed the petition on the ground that petitioner failed to assert a cognizable interest in any specific forfeited property, as required by Section 1963(*l*)(6)(A). Pet. App. 7b-12b.

4. The court of appeals affirmed. Pet. App. 1a-6a. It concluded that petitioner could not establish a qualifying interest in $10,000 of BCCI's forfeited assets because "bank depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced, only in the defendant's estate as a whole—and therefore can have no interest in particular assets forfeited, as required under * * * [Section 1963(*l*)(6)(A)], unless they have already secured a judgment against the debtor and perfected a lien against a particular item." Pet. App. 3a-4a (quoting *BCCI Holdings*, 46 F.3d at 1191).

The court of appeals rejected petitioner's argument that its legally protected status as an international organization had any bearing on whether it had an interest in the forfeited property. "[W]hen [peti-

tioner] deposited its money with BCCI, it gave up legal title to the money in exchange for a claim against BCCI for $10,000. Thus, the subsequent forfeiture worked no confiscation of [petitioner's] property because [petitioner] retained what it had before —a claim against BCCI for $10,000." Pet. App. 4a-5a.

ARGUMENT

1. Section 1963(*l*)(6)(A) permits a third party to challenge a criminal forfeiture on the ground that particular forfeited property actually belonged to the third party and not to the defendant. *United States* v. *Schwimmer*, 968 F.2d 1570, 1580 (2d Cir. 1992). Unless it establishes bona fide purchaser status, see 18 U.S.C. 1963(*l*)(6)(B), the third party claimant must prove (i) that it has "a legal right, title, or interest in the property" and (ii) that such interest "was vested in the [claimant] rather than the defendant or was superior to any * * * interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property." 18 U.S.C. 1963(*l*)(6)(A).[1]

Every court of appeals that has ruled on the issue has concluded that, in the ordinary course, a general unsecured creditor has no cognizable interest in specific forfeited property. See *BCCI Holdings*, 46 F.3d at 1191; *Schwimmer*, 968 F.2d at 581 (same); *United States* v. *Campos*, 859 F.2d 1233, 1239 (6th Cir.

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[1] Petitioner argued for the first time in the court of appeals that it was entitled to recover under Section 1963(*l*)(6)(A) because (it asserted) the money it deposited did not come into BCCI's possession until after BCCI had committed its RICO violations. Since petitioner failed to raise that argument in the district court, the court of appeals declined to entertain it. Pet. App. 5a n.2.

1988) (same); cf. *United States* v. *$20,193.39 U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994) (unsecured creditors do not have standing to challenge civil forfeiture).[2] A general depositor, by virtue of the deposit, is a general creditor of a bank: when the deposit is made, the depositor relinquishes title to the funds deposited and obtains a claim against the bank for the deposited amount. See, *e.g.*, *Citizens Bank of Maryland* v. *Strumpf*, 116 S. Ct. 286, 290 (1995); *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966). Since general "depositors, as general creditors, have no interest in the specific accounts to which their deposits might be traced," it follows that they "can have no interest in particular assets forfeited, as required under both prongs of § 1963(*l*)(6)." *BCCI Holdings*, 46 F.3d at 1191.

2. Petitioner does not contend that its $10,000 deposit with BCCI was anything other than a general deposit. Petitioner does not dispute, moreover, that in the ordinary course a general depositor cannot establish either of the requirements of Section 1963(*l*)(6)(A). See Pet. 16. Petitioner argues, however, that its statutory and treaty rights as an

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[2] In *United States* v. *Reckmeyer*, 836 F.2d 200, 205, 206-208 (4th Cir. 1987), the court of appeals, considering an analogous forfeiture statute, held that where the government forfeits all of a debtor's assets general creditors have an interest in the forfeited property if that is their only means of recovery. Further, it held that a general creditor may be regarded as a bona fide purchaser and be entitled to recovery as such. We believe that the Fourth Circuit erred on both grounds. In any event, petitioner has not relied on either theory of recovery (or even cited *Reckmeyer*); the United States has not seized all of BCCI's assets; and petitioner does not contend that it is a bona fide purchaser.

international organization bestow upon it a privileged status, which permits it to challenge the forfeiture of BCCI's property to the extent that such forfeiture would frustrate BCCI's ability to repay petitioner's deposit. That argument is without merit. None of the rights possessed by petitioner affects the permissibility of the government's forfeiture under RICO of property in which petitioner had no cognizable legal interest.

a. The International Organizations Immunities Act (IOIA), 22 U.S.C. 288a, renders a qualified international organization's own assets immune from confiscation. See 22 U.S.C. 288a(c). Petitioner's reliance on that provision (Pet. 8) rests on the premise that, by effecting the forfeiture of BCCI's assets, the United States exercised dominion over petitioner's property. As this Court explained, rejecting an analogous claim in *Strumpf*, "[t]hat view of things might be arguable if a bank account consisted of money belonging to the depositor and held by the bank. In fact, however, it consists of nothing more or less than a promise to pay, from the bank to the depositor." 116 S. Ct. at 290. Nothing in the IOIA (or any treaty cited by petitioner) purports to give petitioner a property interest in funds placed by petitioner in a general deposit account. Accordingly, when petitioner deposited its $10,000 with BCCI, it exchanged legal title to those funds for a claim against BCCI. Although BCCI's United States assets have since been forfeited, BCCI remains liable to petitioner as a result of the deposit, and petitioner is entitled, like BCCI's other creditors,

to seek to recover its claim (or some proportion of it) in the ongoing worldwide liquidation proceedings.[3]

b. Petitioner's reliance (Pet. 6) on Article 138 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, is misplaced. That provision states that petitioner "shall enjoy * * * such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." Pet. App. 1d. Although petitioner would surely benefit in this case by being deemed (contrary to well-established banking law) to be the owner of $10,000 of BCCI's assets, rather than a general creditor owed that amount, petitioner has not demonstrated that it cannot operate effectively in the United States when treated on a par with domestic depositors.

c. Petitioner's reliance (Pet. 7-8) on Article IV, Section 2, of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, May 14, 1992 (Headquarters Agreement), S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992), is similarly unavailing. The Headquarters Agreement did not enter into force until November 17, 1994—more than 18 months after the forfeiture—and it accordingly has no application in this case. Moreover, even if the Headquarters Agreement were applicable, the cited provision prohibits only the "requisition, confiscation, expropria-

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[3] There is no reason to believe that the position taken by the administrator of the BCCI Barbados branch that "only BCCI's assets in the United States were answerable to [petitioner's] claim" (Pet. 13) will preclude petitioner's recovery in the global distribution of BCCI's remaining assets.

tion [of] and any other form of interference" with property belonging to petitioner. See Pet. App. 2e.

d. At bottom, petitioner argues that, since it must as a practical matter deposit its funds in bank accounts, the forfeiture of bank assets that the bank acquired from petitioner's deposits "'confiscate[s]' * * * the assets of [petitioner], just as surely and effectively as if the United States Government had seized the currency in the petty cash strongbox at [petitioner's headquarters]." Pet. 14. In light of petitioner's ability to participate along with other BCCI creditors in the global distribution of BCCI's remaining assets (including half of the assets forfeited in the underlying RICO case), the effect on petitioner from the forfeiture in this case was not, even as a practical matter, equivalent to a governmental confiscation of petitioner's property. But even if petitioner were foreclosed from recovery in the global proceedings, petitioner's treaty and statutory immunities from *direct* confiscation of its own assets provide it with no basis to challenge *incidental* harms that it may suffer as the result of the forfeiture of property belonging to others. Those immunities would, of course, prevent the government from freezing or otherwise exercising dominion over petitioner's bank account, because the bank account —the claim that petitioner has against the bank by virtue of its deposit—is petitioner's property. The financial assets in the hands of the bank, however, belong to the bank, and petitioner's statutory and treaty protections do not purport to insulate petitioner from the effects of governmental action taken against third parties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Message From the President of the United States Transmitting the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, Signed at Washington on May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992) 2, 3

140 Cong. Rec. S14,475 (daily ed. Oct. 6, 1994) 3

ARGUMENT

I.

In responding to the Petition of the General Secretariat of the Organization of American States ("OAS"), the United States defends the violations of its treaty and statutory law obligations in this case by ignoring the text of those obligations. Rather than confronting the treaty and statutory immunity provisions at issue,[1] the Government focuses almost exclusively on prior judicial analyses of bankruptcy law and domestic forfeiture statutes.

This approach sidesteps the central element of the OAS's claim. Whatever the validity of the domestic law cases cited by the United States -- none of which involved the international treaty and statutory provisions at issue here -- the property of the OAS, as that term is understood under the expansive language of the IOIA and the relevant treaties, is immune from confiscation by the United States.

The sweep of the OAS's property immunity is strikingly clear from precisely what the United States refuses to acknowledge: the straightforward and practical language of the IOIA, the OAS Charter, and the Headquarters Agreement. The IOIA states that "[p]roperty and assets of international

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[1] Article 138 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394 ("OAS Charter"); Article I, § 7, Article III, § 1, & Article IV, § 2 of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992) ("Headquarters Agreement"); and the International Organizations Immunities Act, 22 U.S.C. § 288a ("IOIA").

organizations, wherever located and by whomsoever held, shall be immune from search . . . and from confiscation." 22 U.S.C. § 288a(c) (emphasis supplied). Article 138 of the OAS Charter states that the OAS shall "enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." Those functions necessarily include the ability to hold and transfer funds in bank accounts. The Headquarters Agreement underscores that fact by stating explicitly that "[p]roperty of the Organization shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action" and by defining "property of the Organization" as:

> without limitation, funds and assets belonging to the Organization, by whomsoever held; funds and assets held or administered by the Organization in furtherance of its functions under the Charter, by whomsoever held . . . ; and, in general, all income of the Organization.

Headquarters Agreement, art. IV, § 2 & art. I, § 7 (emphasis supplied).

The Headquarters Agreement reinforces preexisting immunities of the OAS. In transmitting the Headquarters Agreement to the Senate, President Bush explained that "[t]he Agreement in large measure elaborates and codifies the existing arrangements governing the presence of the headquarters of the OAS in the United States." S. Treaty Doc. No. 40, 102d Cong., 2d Sess. III (1992). The President's transmittal message identifies those aspects of the Headquarters Agreement that add to or alter preexisting commitments. Neither the President's message nor the Senate report on the Headquarters Agreement mentions any change to the meaning or scope of the property immunities of the OAS provided for in the IOIA. See S. Treaty Doc. No. 40, 102d

Cong., 2d Sess. (1992); S. Exec. Rep. No. 37, 103d Cong., 2d Sess. (1994). Thus, while to be sure, the Headquarters Agreement came into effect after the confiscation involved in this case (Brief for the United States in Opposition ("Br. Opp.") at 7),[2] the Government does not and could not contend that the Headquarters Agreement's provisions expanded the scope of the long preexisting obligations of the United States with respect to protection of OAS property.

It belies reality to suggest that, in negotiating and ratifying the OAS Charter and the Headquarters Agreement and in enacting the IOIA, the United States did not intend that the immunities provisions of those legal instruments would cover OAS funds held in banks in the United States. The treaties and the IOIA mean what they say. No interpretation of the domestic-law reach of the RICO statute can obviate the plain meaning of relevant immunities provisions. It is not enough, for purposes of defending a confiscation prohibited by treaty, that the confiscation accords with the text of a forfeiture statute. For such a defense to succeed, the statute must specifically override the treaty prohibition, involving a repudiation of international law. (Petition at 14-15.) In this case, the Government does not -- and indeed, given the reaffirmation of OAS property immunities set forth in the Headquarters Agreement, could not -- argue that the 1970 RICO statute[3] overrode the OAS treaty and statutory immunities.

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[2] The Headquarters Agreement was signed in 1992 and was ratified by the United States Senate in 1994. 140 Cong. Rec. S14,475 (daily ed. Oct. 6, 1994).

[3] Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, Racketeer Influenced and Corrupt Organizations, 84 Stat. 922, 941-48 (1970).

II.

The United States also attempts to evade the violations of OAS immunities effected in this case by asserting that the OAS has an opportunity to seek to recover its funds forfeited in the United States "in the global distribution of BCCI's remaining assets." (Br. Opp. at 7 n.3.) Not only does this contention fail to address the fundamental argument that OAS funds held in U.S. bank accounts are immune from forfeiture, but it also is inconsistent with the record.

The record indicates that the OAS has no recourse to the funds available from the global distribution. As explained in the Petition, when the OAS sought to recover its funds from BCCI's Barbados branch, the official Administrator of the branch (having the status of Custodian of the Barbados branch) took the position that the funds were not deposited with BCCI, since the money was not available to the Barbados branch but rather was held captive in Capital Bank in Miami. (Petition at 3.) Based on the record, the United States should have inserted "not" in footnote 3 of its brief: "There is no reason to believe that the position taken by the administrator of the BCCI Barbados branch . . . will [not] preclude petitioner's recovery in the global distribution of BCCI's [non-U.S.] assets." The Government cannot, therefore, avoid the immunities provisions protecting OAS funds on the theory that those funds may be recoverable from a source other than the assets confiscated by the United States.

III.

Even the sole source of law -- domestic forfeiture jurisprudence -- relied on by the Government undermines the Government's position, particularly when taken with the facts of this case (which the Government ignores) and the special treaty and statutory provisions (which it does its best to ignore). The only BCCI asset answerable to the OAS's claim, given the position taken by the Administrator of the Barbados branch, is the account

of the Barbados branch at Capital Bank in Miami. The situation here, where the Government seized all of BCCI's assets in the United States, is analogous to that in United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987), where the Government seized the entirety of assets answerable to the claim of a petitioner seeking relief from forfeiture. In Reckmeyer, the court recognized that, where "[i]n practical terms [the defendant's] entire estate ha[d] been forfeited to the government" and the "petitioners' interests necessarily [lay] within that estate," the position of the petitioner seeking relief from forfeiture is the same as if the Government had seized the petitioner's claim itself. Id. at 206. That is the common sense of the matter and common sense is often good law.

The Government questions the Reckmeyer decision as a matter of domestic law (Br. Opp. at 5 n.2), but whether the decision jibes well with the domestic statutes or not, its teachings clearly fit the broader colloquial terms of the treaties and implementing statutes involved here. It is immaterial that the United States did not seize all of BCCI's global assets; it did seize all of BCCI's assets answerable to the OAS's claim.

IV.

In refusing to consider the special immunity status of the OAS as it relates to the forfeiture challenge presented in this case, the court of appeals not only impeached the rights of the OAS, but also set a precedent that threatens, in the United States and worldwide, virtually all other international organizations, and by extension foreign sovereigns as well. Nowhere does the Government deny the broad significance of this precedent.

This Court should not leave undisturbed an opinion that, like that of the court below, fails so abjectly to grapple with the international legal commitments of the United States. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented

for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900).

CONCLUSION

For the reasons stated in the Petition and in this reply brief, certiorari should be granted.

Respectfully submitted,

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